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No. 273

In the Supreme Court of the United States

OCTOBER TERM, 1953

LEE-HOWARD COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–6a) is reported at 316 F. 2d 209. The Board's decision and order (R. 7–14)[1] are reported at 137 NLRB 187.

JURISDICTION

The decision of the court of appeals was entered on April 24, 1963 (Pet. 1a–6a), and its decree was entered on May 20, 1963 (Pet. 7a). A petition for rehearing was denied on May 24, 1963 (Pet. 36a). The petition

[1] References to the record as printed for the use of the court of appeals are as follows: "R." refers to the "Record" printed by the Board and "S.R." to the "Supplement to Record" printed by the petitioner.

for a writ of certiorari was filed on July 17, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board, in determining the supervisory status of the Company's line leaders, properly considered its findings on the same issue in an earlier unfair labor practice case involving the same parties.

2. Whether the Board properly concluded that the Company's line leaders were "supervisors" rather than "employees" within the meaning of Section 2(11) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 4–5 of the petition. Also relevant is 2(3) of the Act, which reads as follows:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include * * * any individual employed as a supervisor * * *.

STATEMENT

On February 6, 1961, the Union[2] filed with the Board a petition for certification as bargaining representative for a unit composed of all production and maintenance employees—excluding office clericals, professionals, guards and supervisors as defined in the Act—at the Company's St. Louis plant (S.R. 16–20). At the hearing on this petition on March 15, 1961, the Company contended, contrary to the Union, that its seven line leaders and one inspector should be included in the unit as employees, rather than "supervisors" as defined in Section 2(11) of the Act (R. 24).[3] The Company was given a full opportunity to, and did, introduce evidence in support of its position, and its witnesses were subject to cross-examination by counsel for the Union (R. 25–69, S.R. 22–76). At the end of the hearing, Union counsel moved that the Board take official notice of its findings in Board Case No. 14–CA–2255, decided three months earlier, wherein the supervisory status of the Company's line leaders had also been litigated (R. 68).[4] The Com-

[2] International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Lodge 1012, AFL-CIO.

[3] At the time of the representation hearing, there was also a dispute over the supervisory status of "two working foremen, * * * and one chief shipping clerk" (R. 24–25). After the record was closed and transmitted to the Board for consideration, however, it was agreed that these three individuals should be included in the unit (R. 77, n.).

[4] In that case, instituted by charges filed by the Union, the Board had found that the Company restrained and coerced its employees in violation of Section 8(a)(1), and fostered a company union in violation of Section 8(a)(2). Some of the

pany's attorney offered no objection, although he asserted that the Trial Examiner in the earlier proceeding had asked "leading conclusionary questions." The Company's attorney urged the Board to read the entire record in the earlier case, expressing confidence that it would "come up with a different result [regarding the line leaders], even on the old record" (R. 69).

On July 7, 1961, the Board issued its Decision and Direction of Election (R. 75–77). It detailed the facts on which it had found in Case No. 14–CA–2255 that the line leaders were supervisors, and noted that the Company "does not contend that the duties and responsibilities have changed since the Board's earlier determination, but urges that the record in the earlier case was incomplete as to those duties and responsibilities." The Board then added: "However, the record in the instant case indicates that the line leaders continue to possess supervisory duties and responsibilities previously found by the Board. Accordingly, we find that the line leaders are supervisors within the meaning of the Act and we exclude them" from the unit (R. 76–77, fn. 2). The Board further concluded that the inspector should also be excluded from the unit, since "the record shows that she spends at least 20 percent of her time performing the duties of line leader" (*Ibid.*).

An election was held on August 7, 1961. Seventy-three votes were cast for the Union, sixty-five against, and the line leaders and inspector cast ballots which

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acts of unlawful restraint and coercion were committed by the line leaders, and the Board, finding that they were supervisors, held the company responsible for their actions. *Lee-Rowan Company*, 129 NLRB 980; Pet. 8a–35a.

were challenged by the Union (R. 73; S.R. 66–67). The Regional Director conducted an investigation of the challenged ballots. Finding "that the duties, responsibilities and authority of the line leaders and the inspector have not changed between the date of the hearing and the date of the election" and that the "employer raised no issues not previously considered by the Board," he recommended that the Board sustain the Union's challenges and certify it as the representative of the employees in the appropriate unit (S.R. 66–68). The Company filed exceptions to the Regional Director's Report, again contending that the line leaders and the inspector should be included in the unit (S.R. 68–71). On November 3, 1961, the Board adopted the Regional Director's recommendations sustaining the challenges to the ballots cast by the line leaders and the inspector, and certified the Union as the employees' exclusive bargaining representative (R. 73–75).

Thereafter, the Company refused to bargain with the Union on the ground that the certification was invalid since the line leaders and the inspector had been excluded from the unit. The Union filed a charge alleging that the Company's refusal violated Section 8(a)(5) of the Act, and a complaint issued (R. 69–72). At the hearing before the Trial Examiner, the Company did not seek to introduce any new evidence on the status of the line leaders and the inspector, but contended that the findings made in the representation case on the line leaders were defective since they rested solely on the evidence adduced in the earlier unfair labor practice case, which was not part

of the record in the present proceeding (S.R. 11–14). The Trial Examiner concluded that the Board had properly taken official notice of its findings in the earlier unfair labor practice case on the supervisory status of the line leaders, that there was thus no procedural irregularity in the representation phase of the present proceeding, and that the Company's refusal to honor the certification violated Section 8(a)(5) (R. 10–14). The Board adopted the Trial Examiner's report, adding that (R. 8, n. 2):

> In finding in the representation proceeding that the line leaders were supervisors, the Board did not treat the determination made in Case No. 14–CA–2255, 120 NLRB 980 as to the status of the line leaders as *res judicata* on that issue. The Board did consider the earlier determination but then stated:
>
> > * * * the record in the instant case indicates that the line leaders continue to possess supervisory duties and responsibilities previously found by the Board.

The Board accordingly entered an order requiring the Company to bargain with the Union (R. 8).

The court of appeals enforced the Board's order (Pet. 1a–6a). It held that the "Board, in determining, in the representation proceeding, whether the 'line leaders' were supervisors, as they had been found to be in the first unfair labor practice proceeding, was not required to ignore the evidence in that proceeding relative to the status of the 'line leaders' and the inferences fairly to be drawn from such evidence." "These several proceedings before the Board followed each other in logical sequence. They occurred during

the Union's campaign to organize respondent's plant. They constituted, in effect, one continuing controversy between the Union and the respondent." (Pet. 4a–5a.)

ARGUMENT

1. Petitioner's contention (Pet. 13–16) that it was improper for the Board to take official notice of and to consider the findings respecting the supervisory status of the Company's line leaders, which it made three months earlier in a prior proceeding involving the same parties, is clearly insubstantial and presents no issue warranting review by this Court. It is settled that an administrative agency may notice and consider its own record of prior interrelated litigation between the same parties. *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 530; *Market Street Ry. Co.* v. *Railroad Commission*, 324 U.S. 548, 561–562. There is ground for complaint only if the party affected can show "substantial prejudice" in that he was not afforded an opportunity to meet the material considered by the agency. *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.*, 227 U.S. 88, 93; *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 528. See also Administrative Procedure Act, Section 7(d) (5 U.S.C. 1006 (d)); 2 Davis, *Administrative Law Treatise* (1958), § 15.12.

In the instant case, the Company had ample opportunity to contest the application of Board's determination in Case No. 14–CA–2255 to the present case, for the Union moved *at the hearing* in the representation case that official notice be taken of the Board's prior determination. Not only did the Com-

pany fail to object to the Union's motion, but its attorney even urged the Board to read the entire transcript in the earlier case, expressing confidence that the Board would reach a different conclusion. Moreover, at the hearing in the representation proceeding the Company was in fact afforded an opportunity, and utilized it, to present additional evidence on the status of its line leaders. Finally, the Board decision in this case did not rest solely on the record of the earlier unfair labor practice case. The Board, after reciting the evidence in the prior case, went on to find that the conclusion reached there was independently supported by the evidence adduced in this case (*supra*, pp. 4, 6).

2. Petitioners' remaining contentions (Pet. 16-17) likewise present no issue warranting review by this Court. The question whether the Company's line leaders are "supervisors" within the meaning of Section 2(11) of the Act [5] is essentially a question of fact involving the particular circumstances of this case, and is governed by the "substantial evidence" standard of review. See *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504. This Court will ordinarily not review such questions. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–

[5] Section 2(11) defines the term "supervisor" as:

> * * * any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

491. In any event, the factors noted by the Board (R. 76–77, n. 2) make it clear that there was ample basis for the Board's conclusion that the line leaders possessed the indicia of supervisory status enumerated in Section 2(11) of the Act. See *National Labor Relations Board* v. *Mt. Clemens Metal Products Co.*, 287 F. 2d 790, 791 (C.A. 6); *National Labor Relations Board* v. *Syracuse Stamping Co.*, 208 F. 2d 77, 79 (C.A. 2).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1963.

U.S. GOVERNMENT PRINTING OFFICE: 1963